

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE RANDEL JOHNSON,

Defendant and Appellant.

H045522

(Monterey County

Super. Ct. No. SS030945)

Defendant Joe Randel Johnson appeals from the trial court's denial of his second petition for resentencing under Penal Code section 1170.126.¹ One of defendant's 2004 convictions was for a nonserious, nonviolent felony offense, and he received a sentence of 25 years to life for that conviction. He contends that the trial court erroneously concluded that he was not eligible for resentencing. The Attorney General does not defend either of the trial court's actual reasons for denying defendant's petition but instead contends that the trial court's denial of defendant's petition should be upheld on the ground that the 2017 petition was untimely. Because the trial court has not yet had the opportunity to consider whether there was good cause for the late filing of the petition, we reverse the trial court's order.

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

I. Background

Defendant was convicted by jury trial of two counts of attempted first degree robbery in concert (§§ 211, 213, subd. (a)(1)(A), 664), first degree burglary (§ 459), aggravated assault (§ 245, subd. (a)(1)), transportation of a controlled substance (Health & Safe. Code, former § 11352), and misdemeanor assault (§ 240) for offenses that had occurred in 2002 and 2003. The court found true allegations that defendant had suffered prior controlled substance convictions (Health & Safe. Code, § 11370.2) and two prior strike convictions (§ 1170.12) and had served prison terms for one prior violent felony conviction and two prior felony convictions (§ 667.5, subds. (a), (b)). He was committed to state prison to serve a term of 58 years to life. Defendant appealed, and this court remanded for resentencing with directions to strike one of the one-year prison priors. In June 2006, the court resentenced defendant to a term of 57 years to life, which included a term of 25 years to life for the transportation count.

Proposition 36 took effect in November 2012. (*People v. Johnson* (2015) 61 Cal.4th 674, 684 (*Johnson*).) Proposition 36 enacted section 1170.126, which provided: “Any person serving an indeterminate term of life imprisonment imposed [under the Three Strikes law] . . . of a felony or felonies that are not defined as serious and/or violent felonies . . . may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing” under Proposition 36. (§ 1170.126, subd. (b).)

In August 2014, defendant filed a timely petition for resentencing under Proposition 36. In October 2014, the trial court denied his petition on two grounds. First, the court found that his pro per petition was inadequate because it had not specified his current felonies. Second, the court found that defendant was ineligible for resentencing because one of his current felonies was for a violent felony. The two-year period for filing a Proposition 36 petition expired in November 2014.

Proposition 47 took effect in November 2014. In May 2015, defendant filed a pro per petition asking that the transportation count be “designated” as a misdemeanor under Proposition 47.

In July 2015, the California Supreme Court held that “an inmate may obtain resentencing [under Proposition 36] with respect to a Three Strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third strike sentence of 25 years to life” for another current conviction that is serious or violent. (*Johnson, supra*, 61 Cal.4th at p. 688.) Thus, the California Supreme Court rejected in *Johnson* the second rationale upon which the trial court had relied for denying defendant’s timely Proposition 36 petition.

In December 2015, defendant’s Proposition 47 petition was denied on the ground that the transportation count was “not eligible for Prop 47 relief.” In January 2016, defendant appealed from the order denying his Proposition 47 petition. That appeal was dismissed in November 2016, and remittitur issued in January 2017.

In December 2017, defendant filed a second pro per Proposition 36 petition. He noted in his petition that a petition could be filed beyond the two-year limit if there was “good cause” and alluded to the pendency of his Proposition 47 appeal as a reason for his delay.² His 2017 petition identified all of his current and prior convictions. His petition argued that the trial court should not have found that he had *two* prior strike convictions because both of his prior strike offenses had arisen out of a single act.³ In January 2018,

² The allusion was his citation of *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*). A footnote in *Conley* observed that the pendency of an appeal *from the current convictions* would “generally” constitute good cause for the delayed filing of a Proposition 36 petition. (*Conley*, at p. 662, fn. 5.)

³ His two prior strike offenses were assault with a firearm convictions suffered on September 18, 1987. Defendant’s 2017 petition set forth no evidence that the two assault convictions arose out of a single act. He did attach the abstract of judgment for those prior convictions. However, the abstract reflected only that both crimes had been

the trial court denied defendant's second Proposition 36 petition. The court's order stated: "The court reaffirms the prior ruling on 10/9/14 denying resentencing per Penal Code 1170.126(a)." Defendant timely filed a notice of appeal from the denial of his petition.

II. Analysis

The trial court's denial of defendant's 2017 petition simply "reaffirm[ed]" its denial of his 2014 petition. However, neither of the court's reasons for denying the 2014 petition justified a denial of the 2017 petition. First, the 2017 petition, unlike the 2014 petition, identified all of defendant's current and prior convictions. Second, the California Supreme Court rejected the trial court's second ground in *Johnson*. The Attorney General does not contend otherwise. Instead, he argues that the trial court's denial of defendant's 2017 petition may be upheld on the ground that the 2017 petition was untimely.

A Proposition 36 petition must be filed "within two years after [November 2012] or at a later date upon a showing of good cause" (§ 1170.126, subd. (b).) The timeliness of defendant's 2017 petition depends on whether there was "good cause" for the late filing of the petition. The only published case we have located discussing section 1170.126's "good cause" requirement is the Fourth District Court of Appeal's decision in *People v. Drew* (2017) 16 Cal.App.5th 253 (*Drew*). *Drew* filed his petition in September 2016 without any explanation for the delay. The trial court issued an order to show cause why the petition should not be denied as untimely. (*Drew*, at p. 255.) *Drew* responded by telling the court that he had not filed a petition earlier because he did not know that he

committed in 1986 and that a concurrent term had been imposed for one of them. Defendant also attached a partial transcript of his original sentencing hearing in the current matter at which his trial counsel had argued that "those strikes . . . were both part of the same transaction and occurrence."

was eligible until the California Supreme Court issued its decision in *Johnson*. (*Drew*, at p. 255.) The trial court decided that he had failed to show good cause and denied his petition on that ground. (*Drew*, at p. 256.)

On appeal, the Fourth District applied an abuse of discretion standard of review. (*Drew, supra*, 16 Cal.App.5th at p. 257.) It explained that the “trial court must consider all of the relevant circumstances of the particular case, ‘applying principles of common sense to the totality of circumstances,’” and the relevant circumstances include “‘(1) the nature and strength of the justification for the delay, [and] (2) the duration of the delay.’” (*Drew*, at pp. 257-258.) The Fourth District concluded that the trial court had not abused its discretion. “Because there was a clear two-year limitations period that was set to expire at a time when the state of the law was at worst uncertain [prior to *Johnson*], providing Drew with a reasonable and well-supported argument in favor of his eligibility for resentencing, there was simply no legal downside to filing the recall petition prior to the deadline. Under these circumstances, the court could well conclude there was no good cause for the delay.” (*Drew*, at p. 259.) The Fourth District also noted that Drew had waited more than a year after *Johnson* to file his petition, suggesting that *Johnson* was unrelated to his delay. (*Drew*, at p. 259, fn. 4.)

Here, unlike in *Drew*, the trial court did not evaluate whether there was good cause for defendant’s untimely filing of his 2017 petition. Hence, we do not have a discretionary decision to review. Instead, what the Attorney General seeks is a preemptive finding by this court that the trial court *could not have found* good cause for the late filing of the 2017 petition. We cannot make such a finding. Defendant, unlike Drew, did not allow the original two-year period to lapse without action. He filed a timely petition, which was denied on a ground that was later found to be invalid in *Johnson*. Thus, unlike Drew, his efforts were stymied by a court ruling, not by his own inaction. When the California Supreme Court issued its decision in *Johnson*, defendant was in the midst of litigating his Proposition 47 petition, which was not finally resolved

until January 2017. Hence, his delay in filing his 2017 petition was largely excusable in light of the 2014 denial of his original petition, his pursuit of his Proposition 47 petition, and the trial court's lack of jurisdiction during the pendency of his appeal from the court's ruling on his Proposition 47 petition. While he did not file his second Proposition 36 petition until 11 months after the resolution of his Proposition 47 petition, a trial court would not abuse its discretion in finding that this delay was excusable in light of defendant's lack of counsel and need to prepare pleadings for himself in prison.

Consequently, we decline to affirm the trial court's order on the unconsidered ground of lack of good cause for the late filing of the petition, and we reverse and remand for the trial court to consider whether defendant can demonstrate good cause.

III. Disposition

The order is reversed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Danner, J.

People v. Johnson

H045522